ATTORNEY FOR APPELLANT:

LYLE R. HARDMAN
Hunt Suedhoff Kalamaros LLP
South Bend, Indiana

ATTORNEYS FOR APPELLEES:

WILLIAM L. TOUCHETTE
DAVID N. GILYAN
Merrillville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MONROE GUARANTY INSURANCE COMPANY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A03-0608-CV-380
	)	
BUCKO CONSTRUCTION COMPANY, INC. and CONTRACT CARRIERS CORP.,	)	
	)	
	)	
Appellees.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0409-PL-201

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Monroe Guaranty Insurance Company ("Monroe Guaranty") appeals from the trial court's grant of a motion to set aside order of dismissal filed by Bucko Construction Company ("Bucko") and Contract Carriers Corporation ("Contract Carriers") (collectively "Bucko"). Monroe Guaranty raises a single issue for our review, namely, whether the trial court abused its discretion when it concluded that Bucko was entitled to relief under Indiana Trial Rule 60(B)(1).

We reverse.

FACTS AND PROCEDURAL HISTORY

On February 24, 2004, Pampalone Finance Company ("PFC") filed its complaint against Bucko, Contract Carriers, and United States Fidelity and Guaranty Company d/b/a St. Paul Surety ("USF & G"). The complaint alleged breach of contract and unjust enrichment by Bucko and Carriers. In particular, PFC alleged that Bucko and Carriers failed to pay for insurance services that PFC had provided pursuant to a contract among those parties.

On April 8, 2004, Bucko filed its answer and third party complaint against Pampalone Insurance Agency, Inc. ("PIA"); Citizens Insurance Company of America ("Citizens"); Monroe Guaranty; and Hartford Insurance Company ("Hartford"). In the third party complaint, Bucko alleged that PIA, Citizens, Monroe, and Hartford breached their duties to account, record, credit and refund for unnecessary and unreasonable costs and premiums. The third party defendants filed their respective answers to the third party complaint between May 26 and July 9, 2004. On February 10, 2005, Bucko and Carriers

served discovery requests on PIA, and on April 20, 2005, Bucko and Carriers filed their responses to discovery requests served by Citizens and Monroe.

On January 4, 2006, William J. Cunningham and Daniel B. Vinovich, counsel for Bucko, filed their joint motion for leave to withdraw appearance. On January 10, 2006, the trial court granted that motion and granted Bucko thirty days to retain new counsel and sixty days to respond to pending discovery.

On February 16, 2006, David N. Gilyan mailed to the trial court his appearance on behalf of Bucko. The trial court filed-stamped the appearance February 21. Also on February 21, 2006, Monroe filed its motion to dismiss the third party complaint for failure to prosecute, and the trial court set the matter for hearing on May 15, 2006. The motion and order setting hearing were served on Bucko but not on its new attorney, Gilyan. On May 15, 2006, the trial court held the hearing on Monroe's motion to dismiss. Neither Bucko nor Gilyan appeared at the hearing. The trial court granted the motion, dismissing the third party complaint as against Monroe for failure to prosecute.

The next day, on May 16, 2006, Bucko, by counsel Gilyan, filed a motion to set aside the order of dismissal. In support of that motion, Bucko alleged, in relevant part, as follows:

> 1. This matter came before the Court on May 15, 2006 at 1:30 p.m. on Monroe Guaranty's Motion to Dismiss.
>
> 2. Third Party Plaintiffs' counsel, David N. Gilyan, had recently entered an appearance as substitute counsel for Third Party Plaintiffs and was unaware of the pending motion and had no notice of its setting.
>
> 3. That Third Party Plaintiffs' counsel has been in communication with David Buls, counsel for Plaintiff Pampalone Financial Co., Inc., in

> regard to deposition and mediation of all matters in dispute. That Attorney Buls has advised Third Party Plaintiffs' counsel that he has been in contact with all counsel for all parties in an attempt to coordinate calendars.
>
> 4. That Third Party Plaintiffs' counsel was in the court building and spoke to Defendant Monroe Guaranty's counsel immediately after this matter was submitted to the court.
>
> 5. That entry of ruling and judgment on the motion was as a result of mistake and excusable neglect.

Appellant's App. at 46-47. That motion was not verified, nor was it supported by evidence, such as an affidavit.

The trial court did not conduct a hearing on that motion, and on July 27, 2006, the court granted Bucko's motion to set aside default judgment. This appeal ensued.

DISCUSSION AND DECISION

A judgment may be set aside under Indiana Trial Rule 60(B)(1) for mistake, surprise or excusable neglect. Smith v. Johnston, 711 N.E.2d 1259, 1262 (Ind. 1999). We review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard. Ross v. Bachkurinskiy, 770 N.E.2d 389, 392 (Ind. Ct. App. 2002). The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. Id. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Packer v. State, 777 N.E.2d 733, 738 (Ind. Ct. App. 2002).

Indiana law requires a party seeking to set aside a judgment to establish not only the existence of grounds for relief under Trial Rule 60(B), but also a meritorious defense

to the judgment. Bennett v. Andry, 647 N.E.2d 28, 34 (Ind. Ct. App. 1995). A party seeking to set aside a judgment must make a prima facie showing of a good and meritorious defense. Id. at 35. A mere allegation that except for the excusable neglect the action would have been defended is insufficient to set aside a judgment. Id.

Here, it is undisputed that Bucko did not present any evidence in support of its allegations in its motion to set aside judgment. Indeed, Indiana Trial Rule 60(D) generally requires that a trial court hold a hearing on any pertinent evidence before granting relief. Integrated Home Technologies, Inc. v. Draper, 724 N.E.2d 641, 643 (Ind. Ct. App. 2000). Again, the trial court did not conduct a hearing on the motion to set aside. Moreover, Gilyan did not file a verified motion to set aside, nor did he submit an affidavit in support of that motion. As such, the trial court did not consider any evidence in determining whether Bucko had demonstrated mistake, surprise, or excusable neglect, or a meritorious defense to support setting aside the order of dismissal. See Bennett, 647 N.E.2d at 35 (mere allegation of meritorious defense is insufficient to set aside judgment). Neither has Bucko demonstrated the existence of a meritorious defense in its brief on appeal.

Even taking Bucko's bare allegations in the motion to set aside as true, this court has held that it is the duty of an attorney and his client to keep apprised of the status of matters before the court. Sanders v. Carson, 645 N.E.2d 1141, 1144 (Ind. Ct. App. 1995). Bucko had actual notice of the May 15 hearing on Monroe Guaranty's motion to dismiss but did not inform its new attorney of the motion or hearing. Further, Gilyan,

who entered his appearance in February, had three months prior to the hearing to apprise himself of the status of the case.

We hold that because Bucko did not present evidence of a meritorious defense, either to the trial court or to this court on appeal, the trial court abused its discretion when it granted Bucko's motion to set aside. The trial court's May 15, 2006, order of dismissal is hereby reinstated.

Reversed.

RILEY, J., and BARNES, J., concur.